Responsibility for Another's Wrong in Scotland: Stick with *Lister* or Twist with *Mohamud*?

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Should Scots courts follow the approach taken by the Supreme Court in Mohamud v Wm Morrison Supermarkets Plc *or continue with the approach developed by the Inner House? Whether it is explicitly acknowledged or not, this is the question which now faces any court in Scotland when asked to determine if an act falls within the course of employment. This article plots out the development of vicarious liability in Scotland from the House of Lords decision in* Lister *to the Inner House decision in* Vaickuviene. *It argues that when compared to the approach taken by the Supreme Court, there is evidently a degree of divergence between the jurisprudence of both courts on how to determine whether an act is within the course of employment. It suggests that to follow* Mohamud *would be an important development, which raises significant questions about how grounds of liability are developed in Scotland and the UK.*

I. INTRODUCTION

In recent years, the Supreme Court has made several significant decisions relating to vicarious liability,[1] which pose important questions for jurisdictions, like Scotland, who draw heavily upon English tort law jurisprudence. One of the most pressing questions from a doctrinal perspective may be whether the law of Scotland should follow the approach taken by the Supreme Court in *Mohamud v Wm Morrison Supermarkets Plc*?[2] Or should courts in Scotland continue with the approach they have taken since the House of Lords decision in *Lister v Hesley Hall Ltd*?[3] In comparison to the case law concerning the establishment of an employment-type relationship where there has been very little Scots consideration,[4] it appears that Scots courts have developed, since *Lister*, an approach to questions relating to the course of employment with subtle but important differences from that now

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[1] *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 A.C. 1; *Mohamud v Wm Morrison Supermarkets Plc* [2016] UKSC 11; [2016] A.C. 677; *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660 and *Armes v Nottinghamshire CC* [2017] UKSC 60; [2018] A.C. 355.

[2] *Mohamud* [2016] A.C. 677.

[3] *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215.

[4] *Catholic Child Welfare Society* [2013] 2 A.C. 1; *Cox* [2016] A.C. 660; and *Armes* [2018] A.C. 355. Note, however, it was applied recently in *Grubb v Shannon*, 2018 S.L.T. (Sh. Ct) 193.

advocated by the Supreme Court.[5] In fact, the Scottish approach is just one of several different approaches to *Lister* which have emerged in other jurisdictions since 1998. So the question for the Court of Session, when the opportunity arises, is should it stick with its interpretation of *Lister* or twist with *Mohamud* (which arguably includes its own interpretation of *Lister*)? Or even follow the approach of another jurisdiction?

To help answer these questions, this article does two things. First, in order to determine which approach Scots courts should take, the present position of Scots law needs to be clarified. The approach in Scotland to *Lister* and vicarious liability has not always been clear and has generated discussion over the last few years.[6] This article tries to offer a relatively detailed account of the decisions made in Scotland since *Lister*, with a view of establishing what the law is at present. Secondly, it is important to understand the direction *Mohamud* has taken and how that compares to the approach of the Inner House. *Mohamud* has been described as a hidden departure from the *Lister* close connection test.[7] Others have noted that the "extremely liberal understanding of the 'close connection' test" which the Supreme Court has taken means "it is now difficult to conceive of many circumstances that will fall outside it".[8] Hence, *Mohamud* cannot be understood as a mere application of *Lister* or confined to its individual facts. Thus this article tries to make clear what was decided in *Mohamud* and how that approach differs from the recent jurisprudence of the Inner House.

II. BEFORE *LISTER*

The story starts in 2001. In *Lister v Hesley Hall Ltd* the House of Lords overruled the Court of Appeal's judgment in *ST v North Yorkshire CC* decided in 1998.[9] In *ST*, the Court of Appeal said that an employer could not be vicariously liable for an employee who had sexually assaulted a child, albeit the employer may have had overall responsibility for the welfare and safety of that child and charged the employee with ensuring the welfare and safety of that child. While a difficult decision for the

[5] See *Vaickuviene v J Sainsbury Plc* [2013] CSIH 67; 2014 S.C. 147, per Lord Carloway at [22]–[23]. In this case, the Inner House indicated that the approach being developed by the Supreme Court, confirmed in *Mohamud*, differed from that taken by Scots courts since *Lister*.

[6] S. Arnell, "Employers' vicarious liability—where are we now?", 2010 Jur. Rev. 243; Lord Hope, "Tailoring the law on vicarious liability" (2013) 129 L.Q.R. 514; J. Thomson, *Delictual Liability*, 5th edn (Haywards Heath: Bloomsbury Professional, 2014), para.22.10; E.J. Russell, "Historic abuse: the hard reality for victims", 2015 Jur. Rev. 53; D. Brodie, "Just a frolic", 2015 Rep. L.B. 127-1, "Vicarious liability: the net tightens", 2016 Rep. L.B. 129-1, *Reparation: Liability for Delict* (Edinburgh: W. Green), para.A4-009; M. Campbell, "Somerville Harsco Infrastructure Ltd: transferred intent and the scope of vicarious liability" (2016) 20(2) Edin. L.R. 211; and B. Lindsay, "Fostering a new age?" (2018) 22(2) Edin. L.R. 294.

[7] S.S.H. Chan, "Hidden Departure from the *Lister* Close Connection Test" (2016) 3 L.M.C.L.Q. 352.

[8] J. Plunkett, "Taking stock of vicarious liability" (2016) 132 L.Q.R. 556, 561.

[9] *ST v North Yorkshire CC* [1998] EWCA Civ 1208.

Court of Appeal in terms of policy and outcome—leaving the victim without an effective remedy—it was nevertheless the result of a rather simple application of the existing tests of vicarious liability to the facts of the case. Specifically, the court asked the question, often asked by both Scots and English courts and drawn from Salmond on tort law, that is: was the act complained of an unauthorised mode of carrying out an authorised action?[10] The answer was, no. However, in coming to this decision Butler-Sloss LJ did remark that:

> "I find it difficult to visualise the circumstances in which an act of the teacher can be an unauthorised mode of carrying out an authorised act, although I would not wish to close the door on the possibility."[11]

In the same year, the Canadian Supreme Court went through that door in the case of *Bazley v Curry*.[12] Indeed, McLachlin J considered *ST v North Yorkshire CC* and criticised its rigid application of the Salmond tests, she said:

> "Instead of describing the act in terms of the employee's duties of supervising and caring for vulnerable students during a study trip abroad, the Court of Appeal cast it in terms unrelated to those duties. Important legal decisions should not turn on such semantics."[13]

After analysing the jurisprudence, the Canadian Supreme Court said:

> "Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates."[14]

On this basis, the court concluded that when determining the existence of vicarious liability for an unauthorised and intentional act of an employee—which may indeed amount to a criminal act—it should be guided by several principles if the existing case law fails to provide an answer. However, before stating those principles the court said that "the fundamental question is whether the wrongful

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[10] J.W. Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries*, 1st edn (1907), pp.78–79.
[11] *ST* [1998] EWCA Civ 1208, per Butler-Sloss LJ at [18].
[12] *Bazley v Curry* [1999] 2 SCR 534. An approach which was subsequently followed in *Jacobi v Griffiths* [1999] 2 SCR 570.
[13] *Bazley* [1999] 2 SCR 534 at [24].
[14] *Bazley* [1999] 2 SCR 534 at [37].

act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability".[15] These principles articulated by the court should then, accordingly, be used to help determine if there is a sufficiently close relationship between the wrongful act and what the employee was entitled to do; these were: the opportunity provided by the enterprise of the employer; whether the wrong furthered the employer's enterprise, albeit in a way which the employer would not wish; whether the act was related to "friction, confrontation or intimacy" which was inherent in the employer's enterprise; the power which the employer granted to the employee over the victim; and the vulnerability of potential victims for whom the employer was responsible.

Commenting upon the Canadian Supreme Court's decision, Peter Cane said that "developed in this way, the close connection test is a genuine advance on the unauthorised conduct/unauthorised mode distinction".[16] For him, it helped explain why an employer can in some instances be held accountable for conduct which was otherwise "antithetical to the aims of the employer's activity".[17] Additionally, he noted that it gave judges, in the first instance, a sequence of questions which they can pose when faced with a set of facts and an argument that the act was outwith the course of employment. However, what is also evident from *Bazley* and Cane's subsequent analysis is that to take this approach and to ask *Bazley*-type questions you need to be comfortable with judges making these sorts of decisions about the extension of liability and weighing up what will be, at times, competing objectives. According to Cane, it requires that an appellate judge determine whether they interpret the facts as well as the policy-based questions in the same way as the judge in the first instance. In other words, it openly allows for disagreement about how facts should be organised and interpreted and how different policy aims should be balanced. As Lord Hope has noted, to take this approach you need to be open to the merging of policy and criteria-based questions when determining liability.[18] Understanding *Lister* against this backdrop is important. It explains why, in going through the same door that Butler-Sloss LJ pointed towards, and that *Bazley* confidently opened, the House of Lords nonetheless downplayed the degree to which they were innovating within the existing law and the extent to which policy considerations, such as those discussed by McLachlin J, were necessary when using the sufficiently close connection test.

III. *LISTER*

[15] *Bazley* [1999] 2 SCR 534 at [41].
[16] P. Cane, "Vicarious liability for sexual abuse" (2000) 116 L.Q.R. 21, 24.
[17] Cane, "Vicarious liability for sexual abuse" (2000) 116 L.Q.R. 21, 25.
[18] Lord Hope, "Tailoring the law on vicarious liability" (2013) 129 L.Q.R. 514, 525.

In *Lister*, the House of Lords stressed that the approach taken by the Court of Appeal in *ST* was too narrow and restrictive, both in how it formulated the law and how it interpreted the existing case law. First, the court underlined that it was possible for an employer to be held vicariously liable for intentional wrongdoing, even if that amounted to something which was criminal.[19] It was critical of passages from Butler-Sloss LJ's judgment in *ST*,[20] which suggested otherwise.[21] According to the House of Lords, and contrary to the Court of Appeal, potential liability of an employer for intentional wrongs should not be confined to particular tasks or individual cases but rather acknowledged as a general statement of law and *Morris v CW Martin & Sons Ltd*[22] should be interpreted as such. Secondly, it was emphasised that the Salmond test should not be applied rigidly or mechanically but rather in a pragmatic and factually sensitive manner.[23] Lord Steyn said for example that "Employing the traditional methodology of English law [i.e. the Salmond tests]" it was possible to find the employers vicariously liable.[24] "A convenient starting point" for Lord Clyde was "the exposition which can be traced from the first edition of *Salmond on Torts*".[25] It was the "classic" test according to Lord Hobhouse, and an approach which he used to hold the employers vicariously liable in *Lister*.[26] According to Lord Millet, it has "stood the test of time" but is "not without blemish".[27] He went on to highlight a neglected passage in Salmond "which is unfortunately less often cited", that is an employer can be vicariously liable for an act which he has not authorised but which are nevertheless so connected with acts which he has authorised although they are done in an improper way. For his Lordship this could be

> "usefully elided to impose vicarious liability where the authorised acts of the employee are so connected with acts which the employer has authorised that they may properly be regarded as being within the scope of his employment".[28]

The House of Lords unanimously emphasised the close connection test, used in *Bazley*, could be found in the original Salmond formulation of the test, and it was from here that the court could

[19] *Lister* [2002] 1 A.C. 215, per Lord Millet at [72]–[77].
[20] *ST* [11]-[19] per Butler-Sloss LJ.
[21] *Lister* [2002] 1 A.C. 215, per Lord Steyn at [20]–[24]and per Lord Hobhouse at [56]–[57].
[22] *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716; [1965] 3 W.L.R. 276.
[23] *Lister* [2002] 1 A.C. 215, per Lord Steyn at [16], [21]; per Lord Clyde at [41]; and per Lord Millett at [69]–[70].
[24] *Lister* [2002] 1 A.C. 215 at [28].
[25] *Lister* [2002] 1 A.C. 215 at [36].
[26] *Lister* [2002] 1 A.C. 215 at [59].
[27] *Lister* [2002] 1 A.C. 215 at [67].
[28] *Lister* [2002] 1 A.C. 215, per Lord Millett at [69].

establish vicarious liability in a case such as *Lister*.[29] Thirdly, the House of Lords did not feel that it was necessary to revert to policy-based considerations when determining liability in *Lister*; it was possible, according to each individual judgment given by the Lords, to come to a conclusion on vicarious liability based on the facts and a broader interpretation than that taken in *ST* of the existing law.[30] On that basis, they did not follow the approach taken in *Bazley*, in spite of citing it with approval and effectively coming to the same conclusion and adopting the same formulation of the question: was the act complained of closely or so/sufficiently connected to the scope/course of employment? For the House of Lords, you can answer this question without broader discussions of policy or rationale.

IV. AFTER *LISTER*

Following the House of Lords judgment in *Lister* there was criticism that the Lords did not take the opportunity to explore the rationale or justification for vicarious liability while nevertheless introducing a significant extension of that liability.[31] Some argued that this would not only help courts apply vicarious liability in the future but provide some much-needed explanation as to why *ST* was overruled.[32] Additionally, others found the tests articulated by the court difficult to apply in practice while offering no real improvement on the earlier formulation of an unauthorised mode of an authorised act.[33] In part this may be because the Lords took a narrower approach to the close connection test in comparison to other jurisdictions; that is, although favourable reference was made to *Bazley* by their Lordships, the formulation by the Canadian Supreme Court of what was sufficiently close or strongly connected was subtly different from how the House of Lords used it in *Lister*. In *Markesinis and Deakin's Tort Law*, the authors point out that in *Bazley* "the connection is between

[29] *Lister* [2002] 1 A.C. 215, per Lord Steyn at [24]–[28]; per Lord Clyde at [36]–[37]; per Lord Hobhouse at [59]; and per Lord Millett at [69].
[30] *Lister* [2002] 1 A.C. 215 at [23]–[28]; per Lord Clyde at [34]; per Lord Hobhouse at [60]; and per Lord Millett at [83].
[31] P. Giliker, "Rough Justice in an Unjust World" (2002) 65 M.L.R. 269.
[32] Giliker, "Rough Justice in an Unjust World" (2002) 65 M.L.R. 269.
[33] Lord Nicholls said in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2002] 3 W.L.R. 1913 at [25], that *Lister* "affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close". Lord Hardiman in the Irish Supreme Court was also very critical in *O'Keeffe v Hickey* [2008] IESC 72. Also see *Clerk & Lindsell on Tort*, edited by M.A. Jones et al, 22nd edn (London: Sweet & Maxwell, 2017), para.6-29, which says: "*Lister* gives rise to considerable confusion." Additionally, see S. Deakin, A. Johnston, and B.S. Markesinis, *Markesinis and Deakin's Tort Law*, 7th edn (Oxford: Oxford University Press, 2012) 579, which says: "*Lister* simply replaces one verbal formula … with another which in the long run may prove no more inadequate to the task in hand." Further, in *Winfield and Jolowicz on Tort*, edited by W.E. Peel and J. Goudkamp, 19th edn (London: Sweet & Maxwell, 2014), para.2-031, the authors say that some of the criticism is "harsh" but nonetheless acknowledge that "the fact remains that it may still be very difficult to determine incidents for which the employer is responsible in these cases".

the wrong and the risks which are inherent in the enterprise undertaken by the employer".[34] Whereas in *Lister*, the pertinent connection was between the scope of employment garnered from the implied and express terms of employment broadly defined and the wrong complained of.

The Australian courts noted this divergence in approach between the House of Lords and the Canadian Supreme Court,[35] rejecting the approach taken in *Lister* and instead forging a different path to remedy cases similar to *Lister* and *Bazley*. In *Prince Alfred College Inc v ADC*,[36] for example, the High Court of Australia suggested another method by which to determine whether the wrongful act was within the course of employment, saying that when determining this the court must take into consideration the "power, trust, control and the ability to achieve intimacy with the victim".[37] It appears that there is a twofold method developed by the Australia High Court in that you determine scope of employment by asking such questions about trust, power and control and then ask if the employment provided the "occasion" not the mere opportunity for the wrongdoing.[38] The High Court explained[39]:

> "Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the 'occasion' for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable."

To speak of an opportunity appears to be too wide and describes the circumstances under which the wrong took place without first conceptualising what was the scope of the employment. Following this approach, asking about the occasion frames matters from the perspective of the role of the employee rather than working backwards from the wrong towards the employment. This means there is less focus on broader questions of enterprise risk and a far narrower focus on the terms of the job delegated

[34] *Markesinis and Deakin's Tort Law* (2012) 579.
[35] *State of New South Wales v Lepore* [2003] HCA 4, per Gaudron J at [117]–[126] and per Kirby J at [273]=[277].
[36] *Prince Alfred College Inc v ADC* [2016] HCA 37.
[37] *Prince Alfred College Inc v ADC* [2016] HCA 37 at [82].
[38] *Charlesworth & Percy on Neglience*, edited by C.T. Walton et al, 14th edn (London: Sweet & Maxwell, 2018), para.7-69.
[39] *Prince Alfred College Inc v ADC* [2016] HCA 37 at [81].

and whether that relates to the wrong committed. The court said "it is consistent in result with *Lister v Hesley Hall Ltd*, although different in process of reasoning".[40] As will be shown below, the Inner House of the Court of Session as well as the Supreme Court have also claimed to be offering a faithful reading of *Lister*. In contrast, the Irish Supreme Court has been less concerned with being consistent with the House of Lords decision in *Lister*.

Indeed, in 2008, the Irish Supreme Court was highly critical of *Lister* in the case *O'Keeffe v Hickey*.[41] In analysing Lord Steyn's reasoning, Hardiman J said that he "simply cannot see" how the "traditional methodology of English law" could lead to the result in *Lister*. He could not agree that the "common law position" could establish on the basis of the facts of *Lister* that there was a close connection.[42] Additionally, he said that the unauthorised mode of an authorised action articulated in the first edition of Salmond, was not "at all capable of being the 'germ' of the close connection test".[43] Hardiman J, however, found Lord Hobhouse's analysis more convincing, given that he based his decision on the basis of a non-delegable duty resting upon the employer and giving rise to liability rather than manipulating the doctrines of vicarious liability to give such a result. Moreover, Hardiman J remarked that the court in *Bazley* was prepared to admit that there was no precedential basis for extending liability, therefore openly and transparently drawing from policy to extend liability, whereas the House of Lords in *Lister* claimed (disingenuously), "to find a basis in pre-existing English cases and academic writings leading seamlessly to the finding of liability in *Lister*".[44] It was not until 2017 that the Supreme Court of Ireland changed, or clarified, its position, stating that the close connection test had been adopted in Ireland but that Hardiman J's judgment provided salient warnings about its limitations.[45] Indeed, not only did the Irish Supreme Court signal a change in tack but aligned itself towards the Canadian approach outlined in *Bazley* rather than the narrower *Lister* approach.[46]

V. Reception in Scotland

The recent history of *Lister*'s reception into Scots law is important. It helps stress the distance between where the law in Scotland is at present and where the approach taken by the Supreme Court in

[40] *Prince Alfred College Inc v ADC* [2016] HCA 37 at [83].
[41] *O'Keeffe v Hickey* [2008] IESC 72. Hardiman J gave the leading judgment, with Murray CJ and Denham J concurring. In separate judgments Fennelly J and Geoghegan J dissented with regard to whether the close connection test was useful.
[42] *O'Keeffe* [2008] IESC 72, per Lord Hardiman at [98].
[43] *O'Keeffe* [2008] IESC 72, per Lord Hardiman at [109].
[44] *O'Keeffe* [2008] IESC 72, per Lord Hardiman at [120].
[45] *Hickey v McGowan* [2017] IESC 6.
[46] J. Gallen, "Vicarious liability and historic abuse: a critical analysis of *Hickey v McGowan*" (2017) 58 *Irish Jurist* 184.

Mohamud has taken the law of England and Wales. Plotting out the reception also serves to demonstrate how a divergence in approach can easily develop within the jurisprudence of the law of Scotland and that of England and Wales, despite both jurisdictions apparently drawing upon the same leading authorities. Additionally, describing the adoption of *Lister* in Scotland makes clear what is being left behind when a court adopts the *Mohamud* approach. Indeed, how a Scots court has understood *Lister* over the last 18 years and has continued to apply *Lister* in recent cases may mean that the eventual adoption of *Mohamud* is not merely an incremental development but a larger step for the law of Scotland.

In general, the Scots courts have claimed to be faithful to how the House of Lords articulated the law of vicarious liability in *Lister*. Moreover, Scots judges have tended to take the judgments of the Lords at face value: *Lister* was merely applying the traditional Salmond test. This being said, the Inner House has have been very cautious in its application of the close connection test when it comes to the question of extensions of liability based on policy. A key point, however, is that unlike the Inner House, it has been the lower Scottish courts who have understood *Lister* as a significant change in the law. Some Scots courts have not adopted the House of Lords' explanation in *Lister* that it was merely applying the existing law as it stood in 2001, but rather understood *Lister* as an important point of departure. In addition to these general points, a few other points might be added which are relevant to the development of vicarious liability in Scotland.

First, on the basis of the reported case law, it appears that pleaders in Scotland have been reluctant to argue direct liability or non-delegation liability on the same facts as they have pleaded vicarious liability. That is, reported case law does not suggest that counsel in Scotland have attempted to develop other grounds of potential liability. Part of this may be due to the strict requirements of Scots civil procedure, which means when faced with facts which give rise to a vicarious liability claim there is a reluctance to explore alternative forms of liability. Or it may be simply because more explorative arguments about other potential grounds of liability have not been reported. Secondly, although other grounds of potential liability have not been developed in Scotland, it has, nevertheless, been counsel rather than the judiciary in Scotland who have pressed the development of the law of vicarious liability since *Lister* and generally understood it to be a departure from the traditional Salmond approach.

With these points in mind, it could be said that the reception of *Lister* into the law of Scotland can be divided into three rough stages. First, there was the general application of *Lister* in like-for-like factual scenarios, exclusively confined to cases of historic sexual or physical abuse of children. Secondly, there were attempts to extend *Lister* to other factual scenarios, which was accepted in principle but denied in application. Thirdly, there was the Inner House's interpretation of *Lister* which

claimed to be faithful to Lord Steyn and Lord Clyde's approach but, importantly, also saw the Inner House develop a particular focus on the individual facts of the act itself, which implicitly introduced consideration of the motive of the wrongdoer.

1. Applying *Lister* to similar facts

The first stage was the initial application of *Lister*. In fact, it only took six months after the decision in *Lister* was handed down for the sheriff court in Dumfries to apply it in *Gorrie v Marist Brothers*.[47] Whilst a pupil at St Joseph's College in the early 1970s, the pursuer's schoolteacher sexually abused him, but it was not until the late 1990s that he raised his case against the Marist Brothers (who had run the school at the material time). Prior to the decision in *Lister*, there was a preliminary debate where the pursuers conceded that they could not establish vicarious liability against the employer. But following *Lister*, which came only a few months after this concession, they motioned to adjust their argument. On behalf of the pursuer it was argued[48]

> "the House of Lords had departed from the law as it had previously been understood to be and had ruled that an employer could be liable for the clandestine acts of his employee if those acts were committed in circumstances brought about by the nature of that employee's employment. That would cover sexual abuse where an opportunity for that abuse to occur had been created by the specific tasks which an employer required an employee to carry out in the performance of his duties".

Originally, therefore, the pursuers had pleaded negligence on the basis that the Marist Brothers, at the relevant time, had an inadequate system of supervision and monitoring which amounted to a breach of their duty of care. Sheriff Principal McInnes allowed the pursuer's adjustments, and applied *Lister* saying[49]:

> "There was a close proximity or neighbourhood between the pursuer, who was a pupil, and the Marist Brothers who were responsible for his care. There were ample averments to establish the necessary degree of proximity. On the basis of the decision of the House of Lords in *Lister*,

[47] *Gorrie v Marist Brothers* (A206/99), unreported, 2001, Dumfries Sheriff Court. It was also debated by counsel in *Royal Bank of Scotland v Bannerman Johnstone Maclay*, 2003 S.C. 125; 2003 S.L.T. 181. In spite of important questions raised by counsel's debate regarding *Lister*'s application and scope, Lord Macfayden said very little to clarify or explain how *Lister* should be understood or applied in Scotland.
[48] *Gorrie*, unreported, 2001, Dumfries Sheriff Court, para.2.1.
[49] *Gorrie*, unreported, 2001, Dumfries Sheriff Court, para.6.5.

supra it would be fair and reasonable to impose a duty of care on the Marist Brothers in respect of a boy in a boarding school run by them."

Reading the decision in *Gorrie*, it could be reasonably suggested that the sheriff understood *Lister* to change the existing law rather than merely clarify it; that *Lister* specifically applied to the circumstances of concealed wrongful acts; that the course of employment could be characterised by taking into consideration that the employment offered to the employee a recognised opportunity to commit a wrong, but it was important to first determine what that employment was; that the question concerned consideration of the proximity between the act and the employment; and, importantly in these instances, that whether liability attached included a consideration of policy, but that the House of Lords had signalled that this type of extension was acceptable. A similar understanding of *Lister* was taken by the Outer House in 2005 in *B v Murray (No.2)*, although the *Lister* formula was not set out in any detail, they were accepted as part of the law of Scotland.[50] This case was raised against the Congregation of the Poor Sisters of Nazareth, along with approximately 290 other actions which all concerned physical abuse experienced by children whilst they were in care. In the first instance, the Lord Ordinary considered whether to allow the defender's plea of limitation given that the pursuers' claims related to physical abuse carried out in the 1960s and 70s.[51] The pursuers lost, failing to convince the Lord Ordinary to use his discretion. Indeed, *B v Murray (No.2)* is just one of many in Scotland, where following *Lister*, victims of institutional abuse were excluded from establishing their claim in the Court of Session due to the court's refusal to use its discretion relating to limitation.[52] Of note at present, however, is one line of argument put forward in *B v Murray (No.2)*: *Lister* had changed the law in Scotland and, on that basis, it would significantly prejudice the defenders if the Lord Ordinary were to, after the fact, waive limitation. Lord Drummond Young said[53]:

"Closely related to the social and other changes discussed in the previous section is the effect of changes in the law in the last 10 years. In many cases where an application is made under s

[50] *B v Murray (No.2)*, 2005 S.L.T. 982.
[51] Ultimately, he did not allow the case to proceed on the basis that it would be inequitable. The pursuer's subsequent reclaiming motion was dismissed by the First Division of the Inner House, *B v Murray (No.2)* [2007] CSIH 39; 2007 S.C. 688 and the decision of the Inner House was upheld by the House of Lords, *B v Murray (No.2)* [2008] UKHL 32; 2008 S.C. (H.L.) 146. As per the Limitation (Childhood Abuse) (Scotland) Act 2017, s.17A of the Prescription and Limitation (Scotland) Act 1973 now removes the three-year limitation period for abuse, including sexual, physical, and emotional abuse.
[52] For a summary and justified criticism of the law of limitation in Scotland prior to 2017, see E. Russell, "Historic abuse: the hard reality of victims", 2015 Jur. Rev. 53. Also see Lord Hope, "Tailoring the law on vicarious liability" (2013) 129 L.Q.R. 514.
[53] *B v Murray (No.2)*, 2005 S.L.T. 982 at [117].

> 19A this will not be a relevant factor because the law has remained constant. In the present case, however, the law has changed as a result of the decision of the House of Lords in *Lister v Hesley Hall Ltd*. That case substantially extended the law of vicarious liability for the criminal acts of employees and other agents. In that case the owners of a boarding school were held vicariously liable for acts of sexual abuse committed by the warden of a boarding house. Previously it was generally understood that delicts of a criminal nature were unlikely to give rise to vicarious liability because they were not within the scope of the perpetrator's employment. In that case, however, it was held that vicarious liability could be established if there was a sufficient connection between the criminal acts and the work that the person responsible had been employed to do. Where the care of children was entrusted to an employee, and the employee abused his position of trust, such a connection existed, and the employers were vicariously liable."

His Lordship understood *Lister* to change the law; that it applied specifically to delicts which were of a criminal nature; that it was the position of trust that gave rise to liability in *Lister*; and that *Lister* was an "an example of a more liberal approach to vicarious liability that has developed over the last 10 or 15 years".[54] In *B v Murray (No.2)*, the court heard evidence from Sheriff A.G. McCulloch about the legal position relating to vicarious liability and criminal acts in the 1980s[55]:

> "He accepted that the question of vicarious liability had been clarified by the decision in *Lister*. He further accepted that in the 1980s the attitude of the legal profession to the present claims might have been different, although he stated that he would like to think that the pursuers would not have been turned away without a remedy. He did accept that these cases involved to some extent pushing out the boundaries of the law."

Another reported case in Scotland to reference *Lister* is *JM v Fife Council*,[56] around four years after the House of Lords decision. In this case, the pursuer suffered between 1963 and 1966, both non-sexual and sexual abuse from his house master whilst under the residential care of the local authority. He did not raise his action in the Outer House until 2006, where the defenders did not make a plea of limitation and indeed admitted liability. However, the defenders disputed the level of damages and

[54] *B v Murray (No.2)*, 2005 S.L.T. 982 at [118].
[55] *B v Murray (No.2)*, 2005 S.L.T. 982 at [118].
[56] *JM v Fife Council* [2008] CSIH 63; 2009 S.C. 163.

the date from which his damages should run.[57] *Lister* was only mentioned in passing and not considered in any depth but was considered to apply in this instance and be uncontroversial in application. That is, not only did the defenders cede this point before litigation but both the Outer and Inner House took it for granted that *Lister* now applied in Scotland. Offering the leading judgment, Lord President Hamilton made it explicit, in his closing remarks, that the type of vicarious liability which attached to the defenders in this case "may not have been clear until the decision of the House of Lords in *Lister v Hesley Hall Ltd*".[58] Although there is no discussion of *Lister* when it is put into context it appears that what was undisputed in the Outer House following *Lister*: that in situations of criminal abuse of minors, whilst under the care an institution such as a resident school, it is possible to hold the employer vicariously liable for the actions of the employee who carried out such criminal acts. It is also noticeable that in many of the cases preceding *JM v Fife Council* where limitation was argued, there was no dispute as to whether a monastic order, congregation of nuns or unincorporated charitable organisation could be held as an employer. *Lister* was therefore being applied in Scotland narrowly and by analogy rather than by interpreting the ratio or analysing the underlying reasoning or justifications of the House of Lords. Put simply, Scottish courts were not being asked in these cases by either pursuers or defenders to do this nor did it appear necessary in these cases to treat *Lister* as any more than an exception, albeit an important one, to the normal doctrines and authority which applied to vicarious liability.

2. Accepting a wider remit for *Lister*

The second stage of *Lister*'s reception into Scots law relates to situations where *Lister*'s application was extended beyond cases of sexual abuse of minors in care. Importantly, although it was accepted that *Lister* can apply to other factual scenarios, the Court of Session did not suggest that it was extending vicarious liability in these cases but merely applying *Lister*.[59] For example, this is captured in the Outer House case of *Sharp v Highlands and Islands Fire Board*[60] where the defenders questioned the applicability of *Lister* beyond cases of abuse of minors in care. The pursuer had suffered a broken leg while playing a football match organised by his employers as a result of his colleague's aggressive tackle. It was the pursuer's contention that the injury was caused by his fellow employee during the course of his employment. Counsel for the fire board sought to distinguish *Lister*

[57] *J v Fife Council* [2007] CSOH 7; 2007 S.L.T. 85.
[58] *JM v Fife Council* [2008] CSIH 63; 2009 S.C. 163 at [38].
[59] See also *Vance v North Lanarkshire Council* [2008] CSOH 70. However, it is of note that vicarious liability was accepted by the defenders for the violent actions of a doorman in *Ashmore v Rock Steady Security Ltd* [2006] CSOH 30.
[60] *Sharp v Highlands and Islands Fire Board* [2005] CSOH 111; 2005 S.L.T. 855.

on the basis of its facts. In alternative, they sought to apply the test articulated by Lord Reed in the pre-*Lister* case of *Ward v Scotrail Railways Ltd*[61]; that is, it should be asked whether the conduct "fell outwith the employee's authorised functions and was motivated by purely personal emotions".[62] In *Ward*, Lord Reed also quoted the familiar passages from Salmond and it was argued by the employer that the Salmond question should be asked in this case not the *Lister* question. Accordingly, the court should ask either whether the wrongful act was authorised by the employer or whether the act was a wrongful and unauthorised mode of doing some act authorised by the master.

In putting forward this argument, counsel for the fire board were seeking to establish a distinction between *Lister* and the pre-existing law to ensure that *Lister* was used as an exception to the existing law rather than a general replacement of the pre-2001 case law on vicarious liability. In stressing the pre-*Lister* position of *Ward*, the fire board sought to ensure that this would remain the approach to negligent acts which do not immediately strike the court to be within the course of employment. The defender's reliance on *Ward* is also important because Lord Reed's approach in that case is arguably an example of how even before *Lister* there were subtleties to how the Salmond tests and questions would be formulated and applied. As already mentioned, Lord Reed in *Ward* focused, when determining the course of employment, on the latter part of the Salmond test preferring to ask if the unauthorised and wrongful act is an independent act which is outside the scope of his employment. In *Sharp*, however, Lord Macphail was certain that "the leading authority on the matter in both Scotland and England is now *Lister*". Rather than see *Lister* as an exception or as a rephrasing of the Salmond questions, he said that the question was now whether the "actions were so closely connected with [the] employment [of the defender] that it would be fair and just to hold the first defenders vicariously liable".[63] Whatever the law before *Lister*, it is important to note that Lord MacPhail interpreted the question to include a consideration of whether it was fair and reasonable as well as closely connected, but as will be discussed below, this is something which the Inner House has been very reluctant to do.

3. Inner House interpreting *Lister*

Around five years later, there was the third stage of *Lister*'s reception into Scots law. Indeed, the case of *Wilson v Exel UK Ltd (t/a Exel)* gave the Inner House its first opportunity to consider *Lister* and

[61] *Ward v Scotrail Railways Ltd*, 1999 S.C. 255.
[62] *Ward*, 1999 S.C. 255, per Lord Reed at 264.
[63] *Sharp*, 2005 S.L.T. 855 at [30].

give guidance on how it should be applied.[64] It was heard by the First Division, with both the Lord President (Lord Hamilton) and the Lord Justice-Clerk (Carloway) giving judgments. For his part, Lord Hamilton interpreted *Lister* as a reformulation of or a gloss upon the established Salmond test, that

> "a master is liable even for acts which he has not authorised provided that they are so connected with acts which he has authorised, that they may rightly be regarded as modes—although improper modes—of doing them".[65]

He noted that the House of Lords offered different reasons for adopting the close connection test but nevertheless concluded that "the central emphasis of the majority of their Lordships was on the close connection between the task with which the employee had been charged and the conduct complained of".[66] Because, on this basis, Lord Hamilton did not find, in this specific instance, a close connection between the task of the employee and what was complained of by the pursuer, he said it was

> "unnecessary to address the further question—which is one of legal policy—as to whether it was so closely connected with the employer that it would be fair and just to hold the employers vicariously liable".[67]

Upon making this point, he acknowledged that the circumstances in which an employer might be found vicariously liable for the intentional wrongdoing of an employee are not normally close to the employment but that this area of law should develop incrementally on a case by case basis. While acknowledging vicarious liability for intentional wrongdoing was possible, Lord Hamilton said "in any uncertain case the seminal judgements of the Supreme Court of Canada in *Bazley v Curry* and *Jacboi v Griffiths* will require to be considered".[68] In sum, Lord Hamilton interpreted *Lister* fairly narrowly, he was strict when it came to formulating the task of the employee, and appeared to suggest that only if decided case law and existing methods of analysis did not provide an answer, it might then be necessary to ask if it was fair and just to extend liability. There was no wider consideration

[64] *Wilson v Exel UK Ltd (t/a Exel)* [2010] CSIH 35; 2010 S.L.T. 671. Although the Inner House did clarify in 2007 that *Lister* applied to questions relating to whether the act complained of took place within the scope of employment and was not concerned with the initial question of whether there was an employment-type relationship in the first place, see *McE v de La Salle Brothers*[2007] CSIH 27; 2007 S.C. 556, per Lord Osborne at [132], [144]–[146] and per Lord Marnoch at [200].
[65] Salmond, *The Law of Torts* (1907), pp.83–83.
[66] *Wilson*, 2010 S.L.T. 671 at [7].
[67] *Wilson*, 2010 S.L.T. 671 at [12].
[68] *Wilson*, 2010 S.L.T. 671 at [13].

of enterprise risk or whether on the basis of policy, the employer should be held liable. For Lord Hamilton, the existing tests could be applied and gave a clear answer.

Lord Carloway gave what could be described as the leading judgment in *Wilson*. Like Lord Hamilton, Lord Carloway too stressed that the Lords in *Lister* were not necessarily consistent with each other in terms of their reasoning but concluded that "the case must now be taken as definitive in establishing when vicarious liability is to attach to an employer for his employee's actings".[69] He appeared also to take the same approach as Lord Hamilton to the *Lister* and policy questions; that is, you will only ask whether it is fair and just in "new circumstance of potential liability" whereas in *Wilson*, "the ground … is well trodden".[70] In theory, he was prepared to acknowledge, for example, that workplace pranks could fall within the task of an employee, but in this instance, they did not. The close connection test, for Lord Carloway, as it was for Lord Hamilton, was a gloss upon the Salmond test of an authorised mode of an authorised action. He found authority, in *Lister*, to suggest that Salmond's approach was still useful suggesting that

> "the manner in which Lord Steyn [in *Lister*] therefore analysed the liability of the defendants in *Lister* was to look at what their business was, and the part played in that business by the employee, and to consider whether sufficient connection had been established between the employee's actions and what he was supposed to be doing".[71]

It was possible for Lord Carloway to find additional support for this in *Lister*, drawing from Lord Clyde's judgment saying he "too emphasised the importance of the traditional approach" of Salmond and *Kirby v National Coal Board.*[72]

On this basis, Lord Carloway drew from Lord Clyde's judgment in *Lister* three propositions which should assist a court when trying to determine the nature of the employee's task and whether what they did was closely connected. First, "the context of the act complained of should be looked at and not just the act itself"; secondly, "time and place were always relevant but may not be conclusive"; and thirdly, "the fact that the employment provided the opportunity for the act to occur at a particular time and place is not necessarily enough", rather there must be a greater or stronger connection between the task or scope of employment and the act complained of. So far, this approach is familiar but it is here that Lord Carloway introduced an additional proposition or method, which he supposed

[69] *Wilson*, 2010 S.L.T. 671 at [24].
[70] *Wilson*, 2010 S.L.T. 671 at [25].
[71] *Wilson*, 2010 S.L.T. 671 at [26].
[72] *Wilson*, 2010 S.L.T. 671 at [27].

could be used in these circumstances. Lord Carloway quoted from Lord Cullen's decision in *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* saying that the question should be whether the act falls into the "pure personal and independent sphere of life and action".[73] If it does, then it should be considered as outwith the course of employment. However, to ask this question is not the same as a general level analysis of the connection between the act and the nature of the employment.[74] To take this approach, the court is concerned with the motive of the employee, and whether the motive relates to the nature of the employment.[75] Lord Carloway introduces it as an alternative approach, but one which he says is familiar and would not lead to a different result. According to Lord Carloway, it is equally possible to achieve the same result from a practical point of view, by reverting to what he sees as the traditional formula: asking whether the wrongful actings were, on the other hand, a "frolic" of the employee's own devising and execution and thus unconnected with what he was employed to do.[76] However, contrary to Lord Carloway it is not clear that this would lead to the same result. Rather it appears to introduce consideration of why the employee did what they did and the purposes of their actions rather than an investigation into what they did and whether it relates to the nature of the employment.[77]

Support for this fourth leg or additional test is found by Lord Carloway in the judgments of Lord Hobhouse in *Lister* and Lord Millet in *Dubai*. His Lordship argued that

> "there is much to be said for asking, within the context of establishing the close connection and thus that the employee was acting within the scope of employment, the question of whether, on the contrary, the employee was engaged in a 'frolic' of his own".

He added to this saying

[73] *Wilson*, 2010 S.L.T. 671 at [28]; *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co*, 1925 S.C. 796; 1925 S.L.T. 563. Importantly, also quoted by Lord Clyde in *Lister*.
[74] On this point, see M. Campbell, "Somerville Harsco Infrastructure Ltd: transferred intent and the scope of vicarious liability" (2016) 20(2) Edin. L.R. 211.
[75] Lord Carloway rejects in *Vaickuviene*, 2014 S.C. 147 at [35] that: "The relevant connection, which requires to be identified for the purposes of vicarious liability, is not that between Mr McCulloch's racist views and his wrongdoing, but that between Mr McCulloch's employment duties and that wrongdoing." However, the analysis offered in this article suggests that invoking the question of whether or not the employee was on a frolic of their own as a first order question, does exactly that.
[76] *Wilson*, 2010 S.L.T. 671 at [26].
[77] This approach has been consistently rejected by English courts, see recently *Wm Morrison Supermarkets Plc v Various Claimants* [2018] EWCA Civ 2339; [2019] 2 W.L.R. 99. However, it should be noted that leave has been given to appeal this decision to the Supreme Court.

> "there is a crucial distinction between these cases [where an employee uses violence whilst engaged in their employer's business] and the situation where the employee is not doing something in connection with his duties but is engaged on a 'frolic' of his own, in a sense of acting purely on a private venture unconnected with his work".[78]

In effect, this approach means that the court considers the motive of the employee when assessing whether there is a connection between the act and the employment. Although Lord Carloway denies this is the case in *Vaickuviene*, it is difficult to maintain.[79] Because without any clear demarcation between the question of motive and what should be the separate question regarding the act's relationship to the nature of the employment, the Inner House has, in effect, introduced a consideration of the motive into the course of employment test.[80] In describing and characterising the connection in terms of whether the employee was on a frolic of his/her own, the focus moves to the individual act, which invariably includes consideration of motive or intention. This is important and relatively distinctive when compared to the approach now taken by the Supreme Court, which will be discussed further below.[81]

The emergence of a difference between the Supreme Court and the Inner House became clear three years after *Wilson*, in *Vaickuviene v J Sainsbury Plc.*[82] *Vaickuviene* is consistent with *Wilson*, in terms of how it interpreted *Lister*, the methods it used and its general reluctance to discuss or appeal to policy when making its decision. Of note, however, is that the Inner House emphasised that the approach taken by Lord Phillips in *Catholic Welfare Society* was "rather different from that adopted by most, if not all, of the judges in *Lister*".[83] The Supreme Court in *Catholic Welfare Society* departed from the more narrow approach in *Lister* by leaning towards a Canadian understanding of how the connection between the wrong and the employment should be considered. Lord Phillips said in *Catholic Welfare Society* "there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act". He went on to say:

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[78] *Wilson*, 2010 S.L.T. 671 at [32].
[79] *Vaickuviene*, 2014 S.C. 147 at [35]–[36].
[80] See Campbell's analysis too, where a similar point is made with regard to the lack of conceptual clarity in such an approach: Campbell, "Somerville Harsco Infrastructure Ltd: transferred intent and the scope of vicarious liability" (2016) 20(2) Edin. L.R. 211.
[81] See *Mohamud* [2016] A.C. 677, per Lord Toulson at [47] and [48]. Also see the Court of Appeal's decision in a separate case: *Wm Morrison Supermarkets Plc v Various Claimants* [2019] 2 W.L.R. 99 at [75]–[76].
[82] *Vaickuviene*, 2014 S.C. 147.
[83] *Vaickuviene*, 2014 S.C. 147, per Lord Carloway at [22].

> "It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks."[84]

As Lord Carloway described it, "this was the introduction of the 'enterprise risk' … or the 'creation risk' gloss on the imposition of liability".[85] For Lord Carloway, you could explain and justify holding someone responsible for the wrong of another on the basis of the risk that person creates by asking someone else to do something, but the wider policy goals of vicarious liability or the justification of this doctrine has not been part of the legal criteria used by courts when trying to determine the outcome of individual cases. Whether you have created a risk or not and what that risk was, according to Lord Carloway, has not been used by courts when determining whether an act complained of was committed within the course of employment. Rather for the Inner House, the traditional Salmond formula as articulated by the House of Lords in *Lister* was what a court should ask and consider when determining whether an action was carried out within the course of employment. He noted that "it may be said that it is now easier than hitherto to impose vicarious liability in the situation where the employer's business creates … a general risk of harm" or "where that part of the business for which the employee was engaged, created such a risk".[86]

Lord Carloway, however, wished to note that you could nevertheless achieve the same result as this if you asked whether the act was an unauthorised mode of doing an authorised action without the risk of confusing policy questions with legal questions. Moreover, he stressed that the approach of assessing the risk created by the employment was in "danger of confusing direct with vicarious liability".[87] It was best, according to the Inner House, to stay within the confines of the existing tests established in *Lister* and without recourse to questions of whether the enterprise increased the risk of the wrong happening. In *Vaickuviene*, the Inner House was keen to stress that this area of law should be developed incrementally and that thus far the precedents allow for vicarious liability to be attached in cases of sexual abuse of children in care, abuse and harassment within the workplace, and violent attacks carried out by bouncers, sports persons, those tasked with discipline, and the police. To venture beyond these existing categories, was in danger of "subverting the democratic process" and should be approached with great caution. Implicit, therefore, in the judgment given, particularly by Lord Carloway, was that to follow the approach advocated by Lord Phillips, was to ask questions that

[84] *Catholic Child Welfare Society* [2013] 2 A.C. 1, per Lord Phillips at [42].
[85] *Vaickuviene*, 2014 S.C. 147, per Lord Carloway at [22].
[86] *Vaickuviene*, 2014 S.C. 147, per Lord Carloway at [24].
[87] *Vaickuviene*, 2014 S.C. 147, per Lord Carloway at [24].

were far too wide and unnecessary, particularly when, many cases can be solved by using the existing tests as discussed by the House of Lords in *Lister*.

VI. *MOHAMUD* APPROACH

Mohamud continued along the same lines as *Catholic Welfare Society*. Some might say that there has always been a degree of uncertainty with regard to how *Lister* should be interpreted and, therefore, *Mohamud* attempts to offer some clarification following the decision in *Catholic Welfare Society*. On that basis, it could also be said that the difference between *Lister* and recent Supreme Court decisions, is that the Supreme Court is more forthcoming about the grounds upon which its decisions have been made whereas the House of Lords in *Lister* was unwilling to discuss the rationale or policy behind its decision. The first area of uncertainty related to whether the House of Lords, in *Lister*, replaced, overruled or reformulated the traditional Salmond questions; the second related to the basis upon which vicarious liability could be justified, explained and extended; and the third concerned the method to be used when applying the close connection test—do you take a causal approach or do you take a sufficiency approach or use some other kind of method, such as that taken by the Inner House's focus on the motives of the wrongdoer?

First, Lord Toulson implied, as previous courts have, that the close connection test was a reformulation of the Salmond formula but acknowledged, like the Lords did in *Lister*, that the wording of those tests was sometimes constraining or unworkable but the principle remained the same.[88] Lord Toulson wished to demonstrate the incremental development of the law and that the approach taken by the Supreme Court was consistent with the historic approach taken by English law as early as the late seventeenth century. Overall, he wished to stress that the approach taken in *Mohamud* was no significant departure but rather a clarification of a historic position.

Secondly, Lord Toulson also made clear that the doctrine of vicarious liability, according to him, is based on an employer's responsibility for their overall enterprise, its consequences and the risks that that enterprise brings with it. It is on this basis that an employer is made strictly liable for the actions of an employee. Such strict liability was justified, according to Lord Toulson, and could be extended in some circumstances, because although the employer is personally innocent they nevertheless create the risk of the wrong happening, or have put the wheels in motion which ultimately caused the damage, or have asked someone to do something for them which carries with it the hazard or an element of peril which in fact materialises.

[88] *Mohamud* [2016] A.C. 677 at [26]–[28], [43].

Thirdly, he also opted for the more liberal method of determining the scope of employment taken by the Canadian Supreme Court but passed over by the House of Lords in *Lister*. Therefore, when the court says it is taking a broad approach to determining the scope of employment, that involves consideration of the employer's general enterprise and the risks that enterprise might create. It is not just about being generous when interpreting the particular employment's written terms and conditions and what the employee has been specifically tasked with but also how the employee's wrongdoing relates to the general risks inherent within the particular enterprise of the employer rather than the individual motives of the employee.

In taking this approach, it is also clear that the Supreme Court was comfortable with a judge determining whether liability should be extended on the basis of policy, saying

> "the court must decide whether there is a sufficient connection … to make it right for the employer to be held liable under the principle of social justice which goes back to Holt CJ".[89]

A court, therefore, can determine what risks are associated with a particular enterprise and determine whether strict liability can be attached to the employer in those circumstances. Using the term "field of activities" rather than "authorised acts" or scope of employment offers more opportunity for a wider assessment of the nature of employment and whether those activities carry with them risks for which the employer should be responsible. That wider assessment, however, may be significant and involve policy decisions. Lord Hobhouse in *Lister* had sought to keep questions of policy, such as this, separate from concerning criteria-based questions such as the scope of employment, but Lord Phillips in *Catholic Welfare*[90] said that it was not possible to keep both questions separate and separating policy questions from criteria questions is not part of the criteria formulated by Lord Toulson.[91]

Fourthly, Lord Toulson was less concerned with the personal motive of the employee and whether that coincided with the wrongful act, rendering it beyond the course of employment, than he was with the timing and the chain of events which led to the wrong being committed. There was more focus on whether there was a link in time and space between what the employee did and their field of activities than on whether their own personal intentions coincided with the tasks being performed but had no bearing on furthering the employer's enterprise. Less consideration was given to questions of whether the act was purely personal or incidental to the task of the employee and more concern was

[89] *Mohamud* [2016] A.C. 677 at [45].
[90] *Mohamud* [2016] A.C. 677 at [94].
[91] *Mohamud* [2016] A.C. 677 at [44].

given to whether there was a separation in time and space between the employee performing their tasks and the wrong complained of. It appears, if you follow the *Mohamud* approach, that a separation in time and space is more likely to render the task beyond the course of employment rather than demonstrating that, despite an outward appearance suggesting otherwise, the employee's intentions had nothing to do with their employment and, therefore, put it beyond the course of employment.

VII. Approaches Compared

As has been described above, the Inner House has developed its own answers to the questions Lord Toulson answered in *Mohamud*. Like the Supreme Court, the Inner House maintains that *Lister* was a reformulation of the Salmond formula rather than a rewriting of the law. This, however, is not how either the Outer House or the sheriff courts have understood *Lister*; for them, *Lister* did fundamentally alter the law of vicarious liability. Stressing the continuity between *Lister* and the Salmond formula is probably where the similarities in approach between the Inner House and the Supreme Court end. Unlike the Supreme Court, the Inner House has taken a fairly modest and blunt approach, confidently assuming that the lines between policy, principle and precedent are clear. Hence it has stressed that questions of policy or rationale are generally unnecessary and irrelevant to whether an action was within the course of employment. Rather the Inner House has felt able to resolve questions relating to vicarious liability by supposedly relying on existing precedent, existing tests, and following the guidance given by Lord Clyde and Lord Steyn in *Lister*. It has chosen not to follow the approach of the Canadian Supreme Court; it has not assessed the general risks inherent within the enterprise undertaken by the employer, but rather defined the nature of employment with regard to the task specified and the role given to the employee.

In *Vaickuviene*, the Inner House emphasised that general considerations of the risk a particular enterprise creates should not be considered by the court and it should in alternative confine itself to the existing tests articulated in *Lister* and follow the established precedents when it comes to intentional wrongs. Additionally, along with asking whether there is a sufficiently close connection between the employment and the act, it has generally stressed the distance between the wrong and the nature of the employment rather than look for a connection. This approach has surely been the result of the Inner House asking an additional question or using a method of identifying the actions of the employee as either personal or intending to further the employers' enterprise. In effect, the Inner House asks about the employee's motive; it asks the related but separate question of whether the wrong complained of can be described as a frolic or a purely personal matter. If the answer to that

question is yes, then you should not consider the act as falling within the course of employment. It could also be added that in terms of attitude the Court of Session has been conservative and cautious in terms of applying *Lister* and generally hesitant to develop the law in this area. However, in *Mohamud*, Lord Toulson, as has been shown, offered a new take on these specific questions and demonstrated a confidence when it came to the development of vicarious liability.

VIII. FURTHER QUESTIONS

Before concluding, it must be acknowledged that the evolution of the law in this area raises several questions about the way by which the law of vicarious liability has developed and whether this is how Scots courts now operate or perceive their role; it has been developed in England and Wales by a self-conscious and confident appellant judiciary. But this of course raises familiar questions: should a court develop liability in this manner[92]; can a court appropriately consider policy questions[93]; what do we mean when we say policy?[94] It also leads to well-known concerns that the doctrine is too open and susceptible to subjective interpretation of facts; that the political nature of these questions makes the law hopelessly indeterminate; and that justice is being distributed but wrongs are not being corrected. Further, it invites consideration of the rationale or justification upon which the Supreme Court has developed vicarious liability in recent years and if that is consistent with the general approach of tort law in England and Wales.

These questions cannot, however, be answered adequately here, but they do need to be considered by a court and in secondary literature. For although these questions about the Scots courts' interpretation of *Lister* or the Supreme Court's approach in *Mohamud* may appear subtle and possibly pedantic, their application and interpretation deal with a significant transfer of liability or responsibility—not just legal, but also financial and moral—for a wrong committed by another. Of course, for some the flexibility and inconsistency of this area is unsurprising, if you take a more critical attitude towards the possibility of judicial reasoning to be coherent and objective. Whereas for others who strive to uphold consistency and certainty in judicial decision-making, in recent years the doctrine of vicarious liability is arguably a troublesome and challenging area. Scots lawyers need

[92] J. Stapleton, "Duty of Care Factors: A Selection from the Judicial Menu" in P. Cane and J. Stapleton (eds), *The Law of Obligations* (Oxford: Clarendon Press, 1998), pp.59–95; R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007), pp.306–314; A. Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007), pp.171–173; J. Morgan, "Policy reasoning in tort law: the courts, the Law Commission and the critics" (2009) 125(2) L.Q.R. 215.

[93] *Anns v Merton LBC* [1978] A.C. 728; [1977] 2 W.L.R. 1024; *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53; [1988] 2 W.L.R. 1049; *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46; *Smith v Chief Constable of Sussex* [2008] UKHL 50; [2009] 1 A.C. 225; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4; [2018] A.C. 736.

[94] J. Plunkett, "Principle and policy in private law reasoning" (2016) 75(2) C.L.J. 366.

to consider these questions. For present purposes, however, the first step has been to set out the position in Scotland and to compare it with the approach taken in *Mohamud* leaving these wider questions to one side.

IX. CONCLUSION

Since *Mohamud*, the High Court and the Court of Appeal[95] have followed Lord Toulson's approach and thus far expressed no difficulty in applying it; although it could be said that the full potential of Lord Toulson's approach is yet to be tested. Edinburgh Sheriff Court has already cited and used *Mohamud*[96] and most would suspect, given the Inner House's deferential attitude to the Supreme Court, that it would follow the approach taken by Lord Toulson in *Mohamud.* It should be noted that the decision in *Mohamud* is, technically speaking, highly persuasive and not effectively binding upon a Scottish court. This leaves the theoretical option to take a different path and follow the example of other jurisdictions, such as Australia, that have taken a different route from the UK Supreme Court. However, for many it would be surprising if the Inner House was bold or innovative in this area and, moreover, it would be undesirable to introduce any divergence within the UK when it comes to the liability of an employer. Arguably *Mohamud* is clear about its rationale, and furthering social justice should be pursued particularly in an area such as vicarious liability. However, the divergence in approach between the Inner House and the Supreme Court cannot be ignored, particularly when the Inner House jurisprudence emphasises motive rather than enterprise in its analysis. Pursuers and claimants will try, when the opportunity arises, to apply the approach method and reasoning used in *Mohamud*, and attach liability where it would otherwise be difficult to establish if one were to rely solely on the approach taken by the Inner House. Not only are previous decisions which relied on *Lister* now "open to question or possibly not followed",[97] but some commentators have questioned whether it is appropriate for strict liability to be extended in this manner by the judiciary.[98] As noted, these specific questions are beyond the scope of this article; for now setting out the approach in Scotland compared to that of the Supreme Court is the more pressing issue. On the basis of the analysis provided here, it is clear that if the Inner House were to follow the Supreme Court's approach

[95] *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2016] EWCA Civ 457; [2016] 1 W.L.R. 3169 at [10]; *Axon v Ministry of Defence* [2016] EWHC 787 (QB); [2016] E.M.L.R. 20 at [81]–[84]; *Frederick v Positive Financial Solutions (Financial Services) Ltd* [2018] EWCA Civ 431 at [76]; *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214; [2019] 1 All E.R. 1133 at [12]–[35]; *Barclays Bank Plc v Various Claimants* [2018] EWCA Civ 1670; [2018] I.R.L.R. 947 at [41]–[61]; *Wm Morrison Supermarkets Plc v Various Claimants* [2019] 2 W.L.R. 99 at [61]–[78].
[96] *Grubb*, 2018 S.L.T. (Sh. Ct) 193.
[97] G. Junor, "Vicarious liability—redefined?", 2016 S.L.T. (News) 125, 131.
[98] P. Giliker, "Vicarious Liability in the UK Supreme Court" (2016) 7 *UK Supreme Court Yearbook* 152, 159.

in the future, this would be a change in the interpretation and application of the law of vicarious liability in Scotland. Whether that is a good thing or not, is another question.